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COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

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INTRODUCTION

1. At its forty-fourth session, in 1992, the General Assembly adopted resolution 47/33 of 25 November 1992 entitled "Report of the International Law Commission on the work of its forty-fourth session".

2. Paragraphs 4, 5 and 6 of the resolution read as follows:

["The General Assembly,]

"4. Takes note with appreciation of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction;

"5. Invites States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; 1/

"6. Requests the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session;"

3. Pursuant to the General Assembly's request contained in paragraph 5 of the above-mentioned resolution, the Secretary-General addressed a circular letter to Governments dated 1 December 1992 inviting them to submit their written comments, if possible before the forty-fifth session of the International Law Commission.

4. As of 7 May 1993, the Secretary-General had received nine replies from Member States, the text of which appears in the present document. 2/ Replies received subsequent to the above-mentioned date will be included in addenda to the present document.

1/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), annex.

2/ References to the question of an international criminal jurisdiction are also to be found in document A/CN.4/448 and Add.1 reproducing the comments and observations submitted by Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session.

AUSTRALIA

[Original: English]

[3 May 1993]

1. Australia provides the following comments on the report of the Working Group of the International Law Commission (ILC) on the question of an international criminal jurisdiction. The structure of the comments closely follows that of the Working Group report.

2. Australia supported the granting of a mandate to the ILC to prepare a draft statute for an international criminal court. Australia hopes that its comments assist the ILC in this task. Australia does reserve its position on the draft statute that is ultimately prepared by the ILC.

GENERAL COMMENTS

3. In its intervention during the debate on this issue in the Sixth Committee on 28 October 1992, Australia assessed the general approach of the Working Group and noted the importance of the following elements of that approach:

- The detachment of the statute of an international criminal court from the Code of Crimes against the Peace and Security of Mankind;

- The confinement of the jurisdiction of an international criminal court, at least in the first phase of its operation, to individuals and not States;

- The establishment of an essentially voluntary jurisdiction for such a court, which would be concurrent with that of national courts;

- The establishment of such a court, at least in the first phase of its operations, as a facility to be called upon in need, rather than a standing full-time body.

4. Australia wishes to underline the importance of these elements and asks the ILC to give them due weight in its work on a draft statute.

SPECIFIC COMMENTS

Structural and jurisdictional issues

The method of creation of a court

5. Australia agrees with the conclusion of the Working Group expressed in paragraph 437 that an international criminal court should be established under its own statute taking the form of a treaty.

The composition of a court

6. Australia has already noted the importance of the Working Group's view expressed in paragraph 438 of the report that a court, at least in the first phase of its operations, should not be a full-time body but constituted on each occasion it was required to sit. This position reflects an understanding of the limited workload that a court would face, at least in its early years of operation, and the costs that would be incurred in establishing and maintaining a court on a full-time basis with a full complement of judges and a supporting administrative structure. The workload of a court would also clearly be more limited if it exercised concurrent jurisdiction with national courts rather than exclusive jurisdiction.

7. In paragraph 440 of the report, the Working Group rightly points out that judges of a court should be independent and impartial and equipped with suitable qualifications and experience. Similar requirements are laid down for judges of the International Court of Justice (ICJ) in Article 2 of that Court's Statute. There should also be a requirement (akin to Art. 9 of the ICJ Statute) that the judges chosen to sit on a court should represent the "principal legal systems of the world".

8. In paragraphs 442 and 443 of the report, the Working Group sets out one possible arrangement for nominating judges to serve on a court and constituting it when required. Although this arrangement has merit, the ILC should canvass other possible mechanisms to ensure that all relevant issues are fully considered. Such an arrangement should not be cumbersome but built on a simple framework which provides guarantees for the nomination of qualified judges and the speedy convening of a panel of suitable judges to try a given case.

The ways by which a State might accept the jurisdiction of a court

9. Paragraph 444 of the report restates the Working Group's view that a court should not have compulsory jurisdiction. Australia has noted the importance of this view. The establishment of a voluntary jurisdiction for a court would require a mechanism by which States could accept this jurisdiction. As outlined in paragraph 444, a State becoming a party to the Statute would accept "certain administrative obligations". The acceptance of a court's jurisdiction by a State would be done by separate act. As noted by the Working Group, this act could be similar to acceptance of the Optional Clause of the ICJ Statute.

10. Any mechanism for accepting the jurisdiction of a court would have to allow States flexibility in nominating the terms upon which they would accept that jurisdiction. Paragraph 446 of the report suggests various approaches to handling this question. In drafting the provisions of the statute on jurisdiction, the ILC should precisely define the terms on which a State may accept the jurisdiction of a court. Such provisions would need to contain a list of specific offences in relation to which a State could accept a court's jurisdiction. The ILC will also need to bear in mind that many States would no doubt have to reconcile national constitutional requirements with the acceptance of the jurisdiction of a court. These requirements may cover trial format, trial procedures and procedural safeguards.

11. In paragraph 448 of the report, the Working Group considers the question of access to a court by States which are not party to its statute. The Working Group favours access to a court being available to States not parties to the statute on an ad hoc basis. Australia considers this approach should be encouraged as it would enhance acceptance of a court's role. Article 35 of the ICJ Statute envisages that the Court is to be open on a conditional basis to States which are not party to the Statute. Appropriate conditions akin to those suggested by the Working Group in paragraph 448 would have to be imposed on States which were not party to a court's statute.

The subject-matter jurisdiction (jurisdiction ratione materiae) of a court

12. In its intervention during debate on this issue in the Sixth Committee at the forty-seventh session of the General Assembly, Australia noted its general support for the approach of the Working Group in dealing with the subject-matter jurisdiction of a court. Australia continues to support this as a basic approach which would see a court's jurisdiction based on "specified existing international treaties creating crimes of an international character", including the Code of Crimes against the Peace and Security of Mankind, subject to its adoption and entry into force. The treaties themselves would obviously not be picked up in their entirety by the statute. It would be a matter of selecting the relevant crimes created by the treaties over which a court would exercise jurisdiction. Such crimes would have to be carefully defined.

13. The creation of such a jurisdiction, however, is not without its difficulties. The existing treaties, apart from the Genocide Convention (art. VI), which would form the basis of the jurisdiction contain no reference to States parties being given the option to submit cases to a court of the type under discussion. A mechanism will need to be found which resolves this question.

14. A further difficulty would arise where a party to the statute was not also a party to all the treaties forming the basis of a court's jurisdiction. This difficulty would be resolved if there was sufficient flexibility for States to accept the jurisdiction of a court only in relation to those treaties to which they were party. This issue also arises in addressing the question of whether States which have not accepted a court's jurisdiction in relation to offences created by treaties to which they are not party should be able to initiate complaints relating to breaches of those offences.

15. In considering the treatment of offences under the statute, attention should also be given to the relationship between existing treaties and the draft Code of Crimes. Australia noted in the comments it provided earlier this year on the draft Code of Crimes (see A/CN.4/448) that, as currently drafted, the Code overlaps with and replicates definitions of offences already dealt with under existing treaties. More particularly, in a number of cases, the Code omits elements of an existing crime or reduces its scope. If substantive differences between the Code and existing treaties remain unresolved, the subject-matter jurisdiction of a court would not function properly. The general question of the definition of crimes in the statute is dealt with below from paragraph 31 onwards.

16. In paragraph 450 of the report, the Working Group notes that in relation to some treaties it may be necessary to limit the range of offences forming part of a court's subject-matter jurisdiction, so as to avoid a court being overburdened by less serious offences. The example given concerned offences under conventions dealing with illegal trafficking in narcotic drugs. In addressing this issue in its intervention in the Sixth Committee last year, Australia suggested that a court should have a sufficiently flexible discretion in determining whether to hear a particular case. The issue would also arise at the time when a State elected to accept the jurisdiction of a court for particular offences. Having accepted the jurisdiction of a court in this manner, that State would no doubt want to be certain of access to that court for trial of persons alleged to have committed offences of that kind. To provide this certainty, offences listed in the statute would need to specify clearly the degree of seriousness attached to them (thus justifying their coming within a court's jurisdiction).

17. Australia accepts the view of the Working Group expressed in paragraph 451 of the report that, at the first phase of the establishment of a court, its jurisdiction should be limited to those crimes defined by existing treaties and should not be extended to crimes against general international law which have not been "incorporated in or defined by treaties in force".

The personal jurisdiction (jurisdiction ratione personae) of a court

18. The creation of the personal jurisdiction of a court is a complex task, as the Working Group acknowledges in its report. It is a matter that requires detailed consideration.

19. An initial hurdle is the diversity of bases for personal jurisdiction to be found in the domestic criminal law regimes of States. Those States intending to become parties to the statute would no doubt wish to reconcile to the greatest possible extent the personal jurisdiction of a court with the equivalent jurisdiction in their domestic criminal law.

20. A further hurdle to be overcome is the definition of the relationship between a court's personal jurisdiction and the jurisdiction bestowed on States which are parties to existing treaties to deal with persons who have committed offences created by those treaties. This is a further aspect of the broader task of settling the relationship between the Statute and existing treaties.

21. Australia notes that the concept of "ceded jurisdiction" advanced in paragraph 456 of the Working Group's report offers only a partial solution to resolving possible conflicts between a State's jurisdiction under an existing treaty and its acceptance of a court's jurisdiction. As the Working Group notes in paragraph 456, the device of "ceded jurisdiction" would not be effective where a large number of States have a jurisdictional claim under a treaty which establishes a universal jurisdiction over a particular crime. This case would be further complicated where some States claiming jurisdiction were not parties to the statute of a court. Such States might well consider that a State which ceded jurisdiction to an international criminal court rather than making the offender available to one of them for trial was in breach of its treaty obligations to them.

22. In paragraph 458, the Working Group considers the position of the national State in relation to the personal jurisdiction of a court. Australia does not consider as a matter of principle that the consent of the national State should be necessary in every case before a court could exercise its jurisdiction to hear a case. Australia believes there is merit in the alternative proposal put by the Working Group in paragraph 458 that a national State should only be able to prevent a court from exercising its jurisdiction when it is prepared to prosecute the offender before its own courts. This approach presupposes that a national State could prosecute an accused person under its domestic law. Where it could not, a national State should not be allowed to prevent an accused from being tried before an international court.

23. In determining the role of the national State, the ILC will have to give careful consideration to the treatment of dual nationals. There would be potential for conflicts to arise as to the handling of a dual national between the State of residence which had granted that person citizenship and the State of prior residence which still regarded the person as holding its citizenship. The case could also arise where a person was born in a State and accordingly acquired its citizenship but due to the citizenship of his or her parents or grandparents was regarded by another State as also holding its citizenship. The rights of respective States in such cases would need to be determined.

24. Australia believes that finding a solution to the problems highlighted by the Working Group in its consideration of the personal jurisdiction of a court represents one of the greatest challenges in the drafting of the statute. Any solution will need to allow parties to the statute to take account of the jurisdictional claims of other States.

The relationship between a court and the Code of Crimes

25. Australia supports the use of separate instruments to embody the statute of a court and the Code of Crimes against the Peace and Security of Mankind. The arguments in favour of this approach are cogently set out in the Working Group's report.

Possible arrangements for the administration of a court

26. The administrative arrangements for a court will be dictated by its structure, location and workload. If, as has been suggested, a court would not be constituted as a full-time body, at least in the first phase of its operation, there would be a reduced administrative burden which would, in turn, require fewer staff and resources than would be needed to support a full-time body.

27. In paragraph 470 of the report, the Working Group touches briefly on the question of where a court should sit and expresses the view that, where possible, a court should sit in the State where an offence was committed. Australia notes that, if a court is intended to provide States parties to the statute with a forum which can deal with cases at arm's length and remove potential problems from trials, then such States may well be reluctant to have a court sit in their territory.

28. The Working Group has outlined some of the main issues which would arise in the administration of a court. The bulk of these issues do not require detailed consideration at this time. Some attention should, however, be paid to the nature of a court's relationship with the United Nations.

An international criminal trial mechanism other than a court

29. Australia notes the useful exposition in the Working Group's report of the arguments in favour of creating such a mechanism. Australia, however, agrees with the view of the majority of the Working Group expressed in paragraph 485 of the report that these alternative mechanisms do not address the serious concerns which are at the heart of calls for an international criminal jurisdiction.

Applicable law and due process

30. Consideration of the questions of applicable law and due process will require due attention to be paid to ensuring that the resulting provisions of the statute accord with the relevant principles of human rights instruments and United Nations standards in the field of criminal justice.

The applicable law

The definition of crimes

31. Aspects of the question of the subject-matter jurisdiction of a court have been addressed above in paragraphs 12 to 17.

32. As the Working Group notes in paragraph 493 of the report, article 15 (1) of the International Covenant on Civil and Political Rights (ICCPR) embodies the principle of nullem crimen sine lege. Article 15 (1) requires that no one shall be held guilty of any criminal offence under national or international law unless that conduct constituted an offence at the time it was committed. The requirement for legal certainty and clarity in the definition of criminal offences, including defences and penalties, is fundamental to legality in penal matters. Australia supports the Working Group's commitment to upholding this fundamental rule of criminal law.

33. To observe the requirements of article 15 (1), the Working Group argues in paragraph 493 that the jurisdiction of an international criminal court should be confined to specified crimes of an international character defined by treaties in force. Australia's support for this basic approach was reiterated in paragraph 12 above. It is of the greatest importance that the elements of the crimes selected be carefully defined so that the prosecutor is required to prove that the conduct of an accused person encompasses the elements of a given crime.

34. Australia believes that, if the jurisdiction of a court is to include international crimes provided for in existing multilateral conventions, the following issues will need to be dealt with:

(a) The inadequate definition of international crimes in existing conventions (including the lack of reference to defences, exculpatory factors and penalties);

(b) The relationship between the draft Code of Crimes and the existing conventions;

(c) Typology of offences - determining which offences are the most serious and, therefore, should fall within a court's jurisdiction;

(d) How the Statute would confer jurisdiction over serious crimes with an international character.

(a) Specificity

35. Whilst existing international conventions are the most reliable source of international law from which to identify specific penal norms, existing treaties create "criminal offences" in a number of different ways.

36. Some conventions proscribe the conduct and impose binding obligations on States to criminalize and punish that conduct at a national level; others refer more generally to an issue of international concern and create obligations to take measures deemed appropriate by respective States; and some simply create a duty to punish or extradite an alleged offender or cooperate in the prosecution and punishment of certain conduct.

37. Consideration will need to be given as to how specific offences which constitute a serious crime of an international character are to be deduced from the wide range of penal norms created by existing conventions. The elements of the criteria by which certain conduct defined in existing conventions would come within the jurisdiction of a court will need to be identified.

38. In general, it is Australian legal practice at both a federal and state level to specifically identify the constituent elements of a criminal offence, as well as defences, exculpatory factors and penalties. Australia is of the view that, despite reliance on existing conventions which define penal norms, the vagueness which characterizes some provisions has the potential to create difficulties in meeting the requirements of article 15 (1) of the ICCPR.

(b) Relationship between the draft Code of Crimes against the Peace and Security of Mankind and existing multilateral conventions

39. As noted above in paragraph 15, Australia expressed concern in its comments on the draft Code of Crimes that the Code overlaps and replicates definitions of offences already dealt with under other multilateral conventions, as well as in some cases omitting elements of existing crimes or reducing their scope.

40. If a Court is to derive jurisdiction from multilateral conventions other than the Code, the relationship between these conventions and the Code must be clarified.

(c) Typology of offences

41. Australia agrees with the Working Group's recommendation that an international criminal court should be confined to dealing with crimes which are genuinely of an international character.

42. The question arises as to what criteria should be used to determine which offences are to be regarded as:

(i) Of a genuinely international character; and

(ii) Serious enough to warrant inclusion in the jurisdiction of a court.

43. Is the identification of a crime as "genuinely of an international character" sufficient for inclusion?

44. Should jurisdiction ultimately depend on the gravity of the offence committed? Some crimes, such as terrorism, must be regarded as inherently serious.

45. Australia is of the view that these questions need clarification to ensure that objective criteria are relied upon in determining which offences should be within a court's jurisdiction.

46. Australia also notes that there are variations between treaties establishing international crimes in their treatment of the definition of such crimes. These variations can make it difficult to attribute a particular weight or indication as to the seriousness of an offence based on the way in which that conduct is defined in a given instrument.

(d) Provision conferring jurisdiction

47. The question of specificity overlaps with the question of how the statute is to confer jurisdiction on a court. The statute will require a provision or provisions which confer jurisdiction over international crimes. Such a provision or provisions will have an important role to play in ensuring that the statute meets the requirements of article 15 (1) of the ICCPR.

The general rules of criminal law

48. In paragraph 495 of the report, the Working Group notes that most treaties are silent about defences and extenuating circumstances and that no rules of international criminal law on these matters have evolved. In paragraph 496, the Working Group suggests that a court could have recourse to national law. As the Working Group notes, however, national law is in principle only a question of fact at the international level. Two options for dealing with this problem are explored. The first is to refer directly to the application of domestic law where appropriate. The second is to require dual criminality (by residence or place where the act was carried out) and thereby refer to national law indirectly.

49. Australia appreciates that the main concern of the Working Group was to identify sources of applicable law. If the jurisdiction of a court is to run

concurrently with that of national courts (as opposed to exclusively), there is a certain preliminary logic in filling the gaps of international criminal law by recourse to domestic law. Australia believes, however, that on balance this approach will inevitably lead to inconsistencies in treatment across cases and thus create more problems than it solves. Defences and mitigating circumstances available will depend on the nationality and/or the place where a crime is committed. Such inconsistency is not desirable and may undermine the legitimacy of a court. The application of the domestic laws of different countries from case to case would also impose a major burden on the judges of a court who could not be expected to have a detailed knowledge of all such laws.

Applicable procedure

50. Australia agrees with the view of the Working Group expressed in paragraph 500 of the report that the statute of a court or rules thereunder should specify to the greatest extent possible the procedural rules for trials. The Working Group also indicates that it may be necessary for a court to regulate its own procedure in cases not covered by the statute or rules, by drawing on the principles common to the codes of procedure of the States parties.

51. Whilst Australia agrees that the principle of nullem crimen sine lege does not prevent this course of action because that principle is concerned with substantive as opposed to procedural law, the application of different procedural rules again raises the issue of inconsistency.

52. To overcome the potential problem of inconsistency, a unified set of rules would need to be applied whatever the national origin of the accused. Questions of procedure and, in particular, rules of evidence are not just technical matters but (as the United Kingdom delegation pointed out in its intervention on this subject in the Sixth Committee at the forty-seventh session of the General Assembly) are central to ensuring a fair trial. These issues vary across legal systems and in Australia's opinion require detailed analysis.

The penalties to be imposed

53. Australia notes that few conventions define penalties. In paragraph 502 of the report, the Working Group suggested that the statute will need a penalties provision or a court would have to base the penalty on national law or on "principles common to all nations". As stated in paragraph 32 above, Australia believes that the starting-point in considering the question of penalties must be article 15 (1) of the ICCPR which embodies the principle of nulla poena sine lege. This requires "clarity and certainty" in penalty provisions. Australia agrees with the view of the Working Group that recourse to national law or "principles common to all nations" may well not meet the requirements of clarity and certainty. It would, therefore, appear necessary for penalty provisions to be developed for the statute.

54. The Working Group recommended the inclusion of a residual provision in the statute to deal with penalties in the event that no penalty is specified in a treaty or if a specified penalty fell outside the jurisdiction of an international court. Australia is also of the opinion that the inclusion of a residual penalty provision which was not sufficiently detailed would not

necessarily cure the problem and discharge the obligation under article 15 (1) of the ICCPR. If, however, the statute contains penalty provisions, no residual provision would be required.

Ensuring due process

55. In paragraph 503 of the report, the Working Group refers to article 14 of the ICCPR as the primary source of international law on the question of due process without further elaboration. Australia believes, however, that there are a number of issues which need consideration.

(a) Review/Appeal

56. Article 14 (5) provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. This suggests that in the statute of a court there would need to be provision for the review of conviction and sentence by an appellate tribunal, e.g., a full bench of a court. The appellate bench should have the discretion to grant or refuse leave to appeal.

(b) Trial by jury

57. As in other common-law countries, trial by jury is a fundamental element of Australia's legal system. Section 80 of the Constitution of the Commonwealth of Australia guarantees a right for a person charged with an indictable offence under any law of the Commonwealth to be tried by a jury. Australia is not advocating that the statute make provision for trial by jury. It wishes, however, to draw to the attention of the ILC the possible constitutional difficulties Australia and other countries may need to address if they are to accept the jurisdiction of an international court.

58. The problem is highlighted where international instruments create a binding obligation on States parties to criminalize certain conduct under domestic law as a serious (indictable) offence. For example, article 2 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft requires each State party to make the offence "punishable by severe penalties". The Crimes (Aviation) Act 1991 implements Australia's obligations under the hijacking conventions. Section 13 of the Act defines hijacking, within the meaning of the Hague Convention, as an indictable offence. A person charged with that offence, therefore, would have the right to trial by jury.

Prosecution and related matters

The system of prosecution

59. In paragraph 509 of the report, the Working Group recommends an ad hoc independent prosecutorial system. Australia agrees that an independent prosecutorial system is preferable to complainant States conducting the prosecution. Ensuring independence and impartiality in the prosecutorial system is an essential underpinning to the credibility and legitimacy of a court.

60. The Working Group's suggestion that a court appoint the prosecutor after consultation with the States concerned is sensible in that it would preserve the independence of the prosecutorial system while giving the States concerned an opportunity to be involved. It will be necessary, however, to precisely identify which States parties should be involved in the process of consultation with a court. The exact standing of the States parties in the process of selection and appointment of the prosecutor would have to be made clear.

The initiation of a case

61. In paragraph 512 of the report, the Working Group suggests that adopting the system of appointing an independent prosecutor would obviate the need for a preliminary hearing to test the evidence as a court could dismiss "frivolous or unsubstantiated charges". An additional consideration is that preliminary hearings before a court could well be regarded as unnecessarily time-consuming and expensive.

62. Australia believes that the role, function and duties of a prosecutor should be regulated. Questions of ethics; a prosecutor's duty to a court; and obligations towards the defence are the types of issues that need to be addressed.

63. The exercise of prosecutorial discretion and the criteria for prosecution decisions also need to be regulated.

64. Australia agrees with the Working Group's suggestion made in paragraph 511 that there should be scope for review of a prosecutor's decision not to prosecute.

65. In the absence of a permanent independent prosecutorial office, a case could only be brought before a court on complaint from a State party or the Security Council. Australia agrees with the view of the Working Group expressed in paragraph 514 that the power of complaint should extend to any State party which has accepted the jurisdiction of a court with respect to the offence in question. A difficulty would arise where a State party which wished to initiate a complaint in relation to a number of offences had not accepted the jurisdiction of a court in relation to all those offences. This situation will need to be addressed.

Bringing defendants before a court

66. The creation of mechanisms to bring defendants befort a court presents many difficult questions, which must be resolved if a court is to operate effectively. The Working Group has explored a number of these questions in its report. The differing constitutional requirements of States will be one of the major hurdles to be overcome.

67. Australia agrees with the view of the Working Group expressed in paragraph 525 of the report that the statute of a court would have to establish minimum requirements for the transfer of alleged offenders, which would have to be observed by States parties. In drafting these requirements, the Working Group should draw upon existing extradition arrangements between States. The

use of these arrangements as a foundation should result in a set of draft provisions that are more recognizable to States. Conceptual problems, however, may arise over the need for an alleged offender to be extradited to a court rather than a State.

68. In paragraph 527, the Working Group deals with what it would regard as some of the basic elements of a request for transfer, including the existence of evidence which would have to be "prima facie sufficient to justify putting the accused on trial". Australia believes there would be difficulties in this approach. The reference to prima facie evidence would mean different things to different States. Moreover, it is not a universal standard in extradition treaties, many of which adopt a "no evidence" approach whereby the requesting State is only required to provide a statment of the acts or omissions which are alleged against the person sought to the requesting State.

69. As well as considering how an accused person should be brought before a court, Australia believes that attention should also be given to the conditions in which accused persons would be held prior to trial. In this regard, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment should be used as the basic standard.

70. To the extent that offenders may be juveniles, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and articles 37 and 40 of the Convention on the Rights of the Child should be used as the minimum standard.

International judicial assistance in relation to proceedings before a court

71. Paragraphs 528 to 545 of the report usefully explore the issues relating to assistance from States in support of the prosecution of alleged offenders before an international court. Such assistance could well be crucial to the successful prosecution of alleged offenders. Assistance would no doubt be required from a number of countries in complex cases.

72. In paragraph 528, the Working Group notes that assistance would be "'one-way' assistance to the court rather than reciprocal assistance". The Working Group is right to point out that assistance would be "one-way". The question arises, however, as to whether such assistance should be directed to a court. Where mutual assistance agreements and arrangements are established between States. the purpose of assistance sought is for the most part directed towards preparation of the prosecution's case against an alleged offender. Requests for assistance, therefore, are generated by the prosecuting authorities of a requesting State. By the same token, it would be the independent prosecutor who would most likely need to call for the assistance of States in the preparation of cases to be brought before a court. A court which is to hear a case should not be involved nor seem to be involved in the preparation of the prosecution's case. To maintain this separation, assistance from States should be provided directly to the prosecutor.

73. Consideration will also need to be given as to what assistance should be provided to the legal representatives of an alleged offender to ensure that they can prepare a proper defence. The question of financial assistance to defendants unable to fund their defence also needs to be considered. The lack

of financial means in such cases could deny a defendant proper representation. The minimum guarantees in relation to a person's right to legal assistance are set down in article 14.3 (d) of the ICCPR.

74. In paragraph 531, the Working Group suggests there are three options in relation to international judicial assistance. After assessing these options, the Working Group suggests that the best option for assistance, at least in the first phase of a court's operation, would be a general provision in the statute supplemented by a non-exclusive list of the types of assistance which may be sought from States parties. The possibility of a mutual assistance treaty between States parties could then be addressed at a later time. Australia accepts the reasoning behind this assessment. It would stress, however, the fundamental requirement of establishing an effective assistance regime if successful prosecutions are to take place.

Implementation of sentences

75. Australia regards the implementation of sentences to be one of the most difficult questions to be addressed. There are a number of issues to be taken into consideration.

(a) Humanitarian considerations

76. First, a term of imprisonment should not be served under conditions less favourable than those provided in the United Nations Standard Minimum Rules for the Treatment of Prisoners.

77. Secondly, even where the imprisonment of an offender is implemented in a State which complies with those standards, the differences in language, climate and culture may still contribute to difficult conditions of imprisonment.

(b) States

78. There needs to be flexibility in determining which State is to take responsibility for carrying out the sentence. The extent of this responsibility will need to be established, including such matters as the cost of imprisonment.

(c) Transfer of prisoner to national State

79. A number of countries have concluded mutual repatriation agreements in relation to citizens of one party convicted and sentenced in the courts of the other. Australia suggests that consideration be given to including a provision in the draft statute allowing the national State of a convicted offender to implement the sentence, if it so wishes. There are two qualifications to that view. First, a court should be satisfied that the State has a facility which meets the United Nations Standard Minimum Rules for the Treatment of Prisoners. Secondly, there needs to be consideration given to whether the consent of the prisoner should be a prerequisite to granting custody to the national State.

80. If transfer of prisoners is to be permitted, there need to be provisions dealing with proceedings to determine applications for transfers; lawful custody of a prisoner in transit; transfer in the custody of an escort; and so on.

81. Guidance on the handling of the transfer of prisoners might be obtained from the Model Agreement on the Transfer of Prisoners and the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.

Review of sentences

82. Australia agrees with the view of the Working Group expressed in paragraph 546 of the report that consideration should be given to providing for applications to vary sentences. A system of parole, reductions and remissions would need to be considered.

Relationship of a court to the existing extradition system

83. In paragraph 552 of the report, the Working Group correctly raises the issue of the relationship between treaties which adopt the aut dedere aut judicare approach and the jurisdiction of an international court.

84. It is possible that a State party to the statute which elects to use the jurisdiction of an international court may be regarded as in breach of its obligation to prosecute under another treaty where a State to whom extradition has been refused under that treaty does not recognize the jurisdiction of an international court.

85. Australia supports the suggestion in paragraph 553 that the system for handing over accused persons be complementary to the existing prosecute-or-extradite regime. To achieve maximum flexibility and facilitate the widest possible support for a court, States parties which have accepted the jurisdiction of the court in respect of a given offence should have an option to surrender to an international court as a third alternative. Imposing an obligation to hand over an accused person for trial on States that are willing to accept the jurisdiction of a court may deter some States from becoming parties to the statute.

86. In the light of the particular problems arising from the existence of entirely separate treaty regimes, Australia believes that the issue of multiple requests for the extradition of an alleged offender being received by a State party to the statute needs detailed consideration.

DENMARK
(See Norway)

FINLAND
(See Norway)

ICELAND
(See Norway)

ITALY

[Original: English]

[3 May 1993]

1. In the opinion of the Italian Government, the court should have general jurisdiction and be universal in character. In fact, as in any domestic legal system the criminal jurisdiction would not be credible if it was not made applicable to all citizens; also, the jurisdiction of an international court would lose credibility if its application differed in each region or with regard to other types of aggregations. Therefore, Italy is not in favour of the establishment of various regional tribunals, which would not be apt to guarantee the observance of the fundamental principle of equality in the treatment of the accused persons within the proceedings.

2. As for the formation of the judgement organ, due account should be taken, in each case, of the characteristics of the crimes to be judged, in order to ensure that the specific circumstances associated with the facts that are relevant for the proceedings are better understood. Therefore, the judgement organ should include persons who are in the position to understand and evaluate such characteristics.

3. The convention establishing the court should grant all States (including, as the case may be, also non-contracting States) the right to designate persons having the qualifications of competence and impartiality that are required for the participation in the judgement organs appointed for the various cases to be examined. Moreover, the general assembly of the designated judges (or the assembly of the contracting States) should elect the President of the court and the bureau, who will appoint the judgement organ by selecting the names from the general list prepared in accordance with the aforementioned principles and bearing in mind the model provided by the Conference on Security and Cooperation in Europe (CSCE) Stockholm Convention on conciliation and arbitration. At the same time, the seat of the judicial body must be located in a place which gives the most ample guarantees of independence and freedom of judgement. Such location could also be different from the official seat of the court, which could be better established in one of the seats of the United Nations, in order to facilitate as much as possible the activity of the new institution in relation to the rules on privileges and immunities.

4. The statute of the court should be independent from the Code of Crimes against the Peace and Security of Mankind, whose provisions may in fact include crimes that are not subject to the jurisdiction of the international court. The Code of Crimes must certainly be defined in the most appropriate form (either a convention or another type of instrument) and, once defined, will provide substantial guidance for the court. But the statute of the court must remain, none the less, independent from the Code.

5. The structure of the court must include, first of all, a prosecuting authority competent for instructing each case on the basis of the evidence collected following the "notitiae criminis" or the elements that any person may give to the court; secondly, an organ for the decision of the case; and, thirdly, an organ for the appeal.

6. On the jurisdiction of the court, it is the view of the Italian Government that such jurisdiction must be extended to all crimes listed by the Conventions having a universal character. For example, one may recall the war crimes against the peace or mankind considered by the Geneva Conventions and Protocols, the Genocide Convention, the Conventions of the United Nations and of the specialized agencies against terrorism, the Convention on the special protection of diplomats, the Convention on the taking of hostages, etc. The list should remain open in order to allow reference to other conventions whose acceptance becomes gradually more universal. When doubts arise in this respect, the court should be authorized to issue a "preliminary ruling" which could be linked to the point of the acceptance of jurisdiction. In any event, the intervention of the Security Council should be excluded.

That of aggression is a different case. Here it would be impossible to preclude the intervention of the Security Council aimed at establishing whether or not an aggression took place in a given situation. But, once such a decision is taken, the exercise of the jurisdiction of the court must be kept free from any political influence.

7. The jurisdiction of the court must concern the individuals. The fact that an individual is vested with the quality of organ of a State must be declared irrelevant and it must be stated that the rules on immunities do not apply in this case. On the contrary, the State as such must not be subject to the jurisdiction of the court. It could be acceptable that the jurisdiction of the court ratione loci (i.e., relating to the events which had occurred within the territory of a State) is made the object of a possible declaration of acceptance. Conversely, no limits could be admitted as regards the jurisdiction rationae personarum or ratione materiae, except for those provided for by the convention establishing the court. Furthermore, one may also accept that the jurisdiction of the court concurs with the national jurisdiction, if the latter is in fact exercised. However, a certain prejudice in favour of the court's jurisdiction should result from the rules of the constituent convention. The faculty must also be granted to the Security Council to disqualify a national jurisdiction, even if only temporarily, whenever it is deemed that such jurisdiction does not possess the requisites of impartiality universally considered necessary for the conduct of the proceedings.

8. All the provisions internationally recognized and concerning the inapplicability of causes of exclusion of criminal responsibility such as the

superior's order, the lack of knowledge of the act by the subordinate, etc., must be reproduced in the statute. To this end, it is suggested that, in drafting the statute of the court, the content of part I of the draft Code of Crimes, which considers the general principles of criminal responsibility and punishment, is largely used as a model.

9. On the question of trials in absentia, Italy has some doubts on the need to admit these types of proceedings. In fact, while many arguments can be adduced both in favour of and against the admissibility of trials in absentia, Italy tends to share the view that their exclusion is more consistent with the idea of a credible (and not only declamatory) justice.

10. The statute of the court must also accurately specify, on the basis of the existing rules of international law, the procedural guarantees provided in favour of the accused persons.

11. Finally, the court must impose penalties and determine where its sentences will be executed. At the same time, if the court is given the authority to decide on the indemnification of the victims of crimes and the right to be indemnified is recognized by the court to a victim, different mechanisms (resulting, for example, from the establishment of special funds) could also come into play to resolve issues such as the amount of compensation, the identification of the debtor and the implementation of the court's decision.

12. The execution of the sentences of the court must take place under the control of the United Nations in order to prevent the granting of undue amnesties or pardons.

MEXICO

[Original: Spanish]

[5 May 1993]

The draft under consideration constitutes a distinctly novel initiative. The international community does not yet have experience in the establishment of permanent international criminal courts. The only existing precedents, the Tokyo and Nürnberg Tribunals, were the product of special circumstances having been created by Powers which had emerged victorious from armed conflicts of great magnitude; they cannot, therefore, serve as a precedent for a notion such as the one with which we are now concerned.

In the light of recent experience with regard to the establishment of a war crimes tribunal for the former Yugoslavia, and the role which the United Nations plays in the maintenance of international peace and security, some countries have proposed the establishment of an international criminal court within the framework of, and closely linked to, the Organization. The absence of provisions in the Charter of the United Nations regarding the establishment of bodies of this type, and the fact that the Organization is based on the principles of the legal equality of States, the self-determination of peoples and non-intervention in the internal affairs of States, prompts us to suggest that the creation of an international criminal court is feasible only with the

express consent of States, as embodied in an international treaty, and only to the extent to which States are willing to be bound by its provisions.

Until now, it has been an internationally accepted general rule that the criminal courts of States are the normal and natural bodies with jurisdiction to try individuals who commit crimes. The rendering and administration of justice within its territory is a basic function of a State and an obligation from which it cannot be excused. Transferring that obligation to a supranational body may not only have direct effects in the area of territorial sovereignty, but may also conflict with the constitutional basis of some States.

The tremendous differences that exist among the various penal systems constitute a further obstacle to the notion of an international jurisdiction. Not all systems agree, for example, on such concepts as capacity, penalties, legality, and so on, as is clear from the discussions held in the various forums in which the notion has been raised.

In its report (A/47/10, annex), the Working Group on the question of an international criminal jurisdiction, recognizing the obstacles confronting an initiative of such magnitude, has proposed the establishment, by a Statute in the form of a treaty, of an ad hoc mechanism, having optional jurisdiction, in the first instance only, to be exercised, in the first phase of its operations, only over private persons (without prejudging State responsibility, when appropriate).

Despite the flexibility of the mechanism proposed by the Working Group, the close link that exists between the proposed international criminal court and the draft Code of Crimes against the Peace and Security of Mankind - which, if adopted, will be applied and interpreted by that court - adds a number of difficulties to those that already exist; it requires the study of such questions as the principles of non-retroactivity and of legality of the crime, penalties, prescription of the public right of action, and so on, which in the terms proposed, conflict in almost every case with the principles on which the various penal systems in the world are based. For example, the draft Code seeks to establish the non-applicability of statutory limitations to international crimes, whereas the majority of national codes have so far provided for such limitations; it also envisages referring to other bodies of law in connection with such sensitive issues as penalties, when, in fact, penalties constitute an essential element of these types of norms.

Furthermore, some questions which play an important role in the decision to establish an international criminal court - questions relating to the establishment of an international prison system which can guarantee the implementation of the penalties imposed by the court or a similar mechanism; verification of the implementation of such penalties by the judicial body which imposes them; the handing over of alleged perpetrators of international crimes by the States which have custody of them; and the establishment of a prosecutorial organ responsible for instituting criminal proceedings - have yet to be clarified.

In the specific case of Mexico, acceptance of an international criminal jurisdiction would appear extremely doubtful in the light of our domestic legal system, under which imposition of penalties is the exclusive prerogative of the

judicial authorities, and therefore of the Mexican courts (arts. 21, 103 and 104 of our Political Constitution).

While the State's monopoly on criminal proceedings could be compatible with the notion of optional and concurrent jurisdiction, the nature of the jurisdictional mechanism proposed could lead to its being connected with a special court; this would conflict with the provisions of articles 13 and 14 of the Constitution.

The exceptions envisaged by the draft to the principle non bis in idem, which permit double jeopardy in circumstances that are by no means clear, and the international nature of the court, which makes it necessary to rely on general principles of law and to consider referring to other bodies of legislation in respect of situations not provided for in the Statute (as the Working Group acknowledges in its report), conflict with the guarantees of legal safeguards afforded by our system of law, especially criminal law, in which norms are strictly applied and analogies are tightly restricted.

Moreover, the fact that a number of international instruments do not envisage the penalties to be imposed for crimes of an international character, but simply provide that States have an obligation to prevent and suppress them, indicates that the norms have not been properly incorporated. In order for a penal norm to meet constitutional requirements, it must consist of a rule (a description of the offence) and must envisage a punishment. According to the principle nullum crimen sine lege, nulla poena sine lege, which is the basis of our legal system, absence of a punishment constitutes an impediment to the application of the norm (no agreement has been reached on the penalties to be included in the draft Code, although it has been decided that their inclusion is absolutely necessary).

In its report, the Working Group supports the view that the court should have jurisdiction over crimes committed prior to its establishment, provided that the offences in question are crimes of an international character defined by treaties in force at the time when they were committed. That argument, in the Group's opinion, is rooted in the notion that a retrospective change in proceedings in no way affects the principle of non-retroactivity. We consider such an approach to be unreasonable. Aside from the fact that article 14 of our Constitution provides that no person shall be deprived of rights without a trial held before a pre-existing court, in accordance with laws enacted prior to the commission of the offence, the existence of an international treaty which envisages some crime of this type is not in itself sufficient to confer on the court automatic jurisdiction to try and punish the crime, especially if such an instrument recognizes that the national courts of States have the power and the obligation to suppress such offences.

One of the more sensitive issues relates to the handing over of alleged perpetrators to the international court. Under the assumption that an international court is not a foreign court, the Working Group favours the immediate handing over of the accused, without need for an extradition proceeding, which is questionable. While it is true that an international court would not be a foreign court, it would not be a domestic court, either; for purposes of handing over an accused person, it would have to be equated with a foreign court and, accordingly, it would be necessary to guarantee that the

accused was able to fully exercise his right by the competent national authorities in an extradition proceeding.

New difficulties emerge in this connection. In the first place, in accordance with practice, the handing over of citizens is subject to the discretion of the federal executive authorities; secondly, the Mexican Act on International Extradition (which would be the applicable law, initially at least), establishes specific requirements for acceding to an extradition request (arts. 7, 8, 9 and 10, inter alia), which conflict with the principles on which an international court would be based, one example being the rule that, where the right of action in respect of the offence in question is time-barred under Mexican criminal law, the extradition request is inadmissible.

There are still a number of ambiguities in the report of the Working Group which would benefit from more thorough analysis, inter alia, those relating to the establishment of a Prosecutor's Office and to the prison system. However, since the Working Group has given preliminary consideration to them, we will refrain from commenting on them until such time as further information is available.

Currently, the Mexican legal system is incompatible with the establishment of an international criminal jurisdiction. Nevertheless, we suggest that, in the discussion of the topic, careful consideration be given to the following:

- The nature of the rendering of criminal justice and the close link between that and the exercise of State sovereignty. Whatever jurisdictional mechanism is finally adopted should reflect maximum respect for the territorial jurisdiction of the judicial organs of individual States, and should have the latter's express consent;

- The need to guarantee the total independence of the jurisdictional body, if and when it is established, and the impartiality of its judges. Several States have expressed support for a special agreement linking the court to the United Nations system. Although that proposal is logical, in view of the forum in which the concept has been developed, the types of crimes over which the court would have jurisdiction (aggression, threat of aggression, systematic human rights violations, and so on) make it especially vulnerable to political fluctuations. A court whose decisions in respect of specific crimes could be overruled by the Security Council could diminish confidence in the international community;

- The need to ensure that the Statute which governs the functioning of the court is drafted in such a way as to envisage specifically each of the cases in which penal norms would be applied, so as to leave little or no room for referral and the application of other additional legislation;

- The fact that rules and punishments constitute basic elements of penal norms which is, moreover, expressed in the universally accepted principle nullum crimen sine lege, nulla poena sine lege, must be reflected in the statute of any court which applies the law. The characterization of the offence and the applicable penalty should not

be omitted from either the international instruments which define crimes of that nature, or the Statute of the court; in the latter case, the principle of legality of the crime requires their inclusion;

- The retroactive application of law, the question of whether statutory limitations should, in fact, apply to crimes deemed to be of an international character, as has been the case, up to now, under the legal systems of many countries, and the notion of permitting double jeopardy are some of the sensitive issues which must be clarified before further steps are taken towards the establishment of a court. A jurisdictional body should, in principle, try only offences committed following its establishment, and should apply the laws that were in force at the time when the offence was committed;

- The definition of the arrangements for the handing over of alleged perpetrators to the court. Respect for the right of all persons to a hearing, to due process and to legal safeguards requires the proper observance of extradition treaties and recognition of them as the sole mechanism for handing persons accused of committing an offence over to foreign courts.

Lastly, until such time as the international conditions required for the establishment of an international criminal jurisdiction are generated, and further progress is made in the progressive development of the law of nations, emphasis should be given to strengthening both national institutions and States to international judicial assistance, as the sole viable alternative means for States to combat crime.

NORWAY

[Original: English]

[27 April 1993]

The Nordic countries welcome resolution 47/33 adopted by the General Assembly of the United Nations at its forty-seventh session requesting the International Law Commission to continue its work on the question of an international criminal jurisdiction by undertaking the project for the elaboration of a draft statute for an international criminal court.

The International Law Commission should consider this project as a matter of priority during its forthcoming session. The ideal outcome would be for the Commission to draw up a draft statute which could be submitted to the forty-eighth session of the General Assembly. In order to make this possible, consideration should be given to whether certain questions of detail could be clarified at a later stage, e.g., during the Commission's second review of the statute. One such question would, for example, be the composition of the court. The same applies to the question of the implementation of sentences, which should be given closer consideration.

On the other hand, it may seem expedient and necessary for the Commission to devote more attention to procedural questions than to substantive matters

such as describing offences and determining sentences. A number of detailed proposals for procedural provisions have already been forwarded to the Security Council under its resolution 808 (1993).

The Nordic countries would also emphasize that the question of an international criminal court must be viewed separately from that of a Code of Crimes against the Peace and Security of Mankind. Many basic international crimes have already found expression in existing and generally accepted treaty law, and the effective implementation through, inter alia, the establishment of an international criminal court should not await the finalization of the draft Code, a project that may take considerably more time than drafting a statute for a court.

Although the Nordic countries support the idea of establishing a permanent court through an international convention, they are at the same time of the view that the establishment of such a court should be based on an evolutionary approach. This implies, for example, that the court, at least in its initial phase and until a clear idea is obtained of how much it would be used, should not be a full-time body, but rather an established structure which can be called into operation when required.

The Nordic countries endorse the suggestion in the report of the Commission's Working Group that by becoming a party to the statute, a State would only accept certain administrative obligations. The States parties should accept the court's jurisdiction by making a declaration to this effect, analogous to acceptance of the compulsory jurisdiction of the International Court of Justice. States that are not party to the statute should, in conformity with the two-step process described in paragraph 444 of the report of the Working Group, also be given an opportunity to declare their acceptance of the court's jurisdiction on an ad hoc basis.

As regards the subject-matter jurisdiction (jurisdiction ratione materiae) of a court, this should be based on international conventions, such as the Geneva Conventions and Protocols and a prospective Code of Crimes, rather than on national legislation. Particularly in a long-term perspective, the use of national legislation could pose certain problems, e.g., as regards which acts are defined as offences in the legislation of the various countries, descriptions of offences, determining sentences, etc.

The offences within the jurisdiction of the court should be limited to serious crimes against mankind such as war crimes, be they committed by high military commanders or soldiers in the battlefield. On the other hand, there is a great need for a more precise definition of war crimes as well as the concept "serious offence".

As regards the personal jurisdiction (jurisdiction ratione personae) of a court, the consent of the State of which the accused is a national should not be required. Nor should the consent of the State where the offence was committed be required unless the perpetrator is under the jurisdiction of that State. Generally speaking, the jurisdiction of a court should be very wide; if the consent of the various States involved is required, this could easily impair the effectiveness of such a court.

Reference is also made to the statement made by Norway on behalf of the Nordic countries in the Sixth Committee on 27 October 1992 during the forty-seventh session of the General Assembly.

SWEDEN

(See Norway)

UNITED STATES OF AMERICA

[Original: English]

[13 May 1993]

Introduction

In accordance with paragraph 6 of General Assembly resolution 47/33 of 25 November 1992, the Government of the United States of America appreciates the opportunity to submit written comments on the report of the International Law Commission Working Group on the question of an international criminal jurisdiction ("the report") (A/CN.4/L.471).

These comments address the project for the elaboration of a draft statute for an international criminal court. Along with other States, the United States made clear during the forty-seventh session of the General Assembly that the request to begin this project is not to be viewed as an endorsement of an international criminal court. Rather, in view of this question's significance and the importance of ensuring that such a proposal would best advance the important ideals and objectives which a permanent court might serve, the task ahead is further to consider, and find sound and effective solutions to, the difficult questions involved.

The following comments are accordingly not intended as a comprehensive commentary on the Working Group's report. Rather, they present the views of the United States on some of the more important initial questions which have been identified thus far. These views are presented without prejudice to any further submissions on these and other aspects of the report which the United States may subsequently provide. Moreover, the United States wishes to emphasize that its failure to comment on other aspects of the report should not be viewed as an endorsement of those aspects of the report.

General approach

In requesting the Commission to undertake this project, the General Assembly requested the Commission to "begin [] with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee" and called upon the Commission to "take [] into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States". It is noteworthy in this regard that the General Assembly requests the Commission to submit a "progress report" to the General Assembly at its forty-eighth session.

As the United States indicated during consideration of this subject in the last session of the General Assembly, we welcomed the report as a significant contribution to the discussion of this very important subject. In our view, the report provided very useful analysis of many of the complex issues associated with the proposal to establish an international criminal court. In particular, we believe the basic approach advocated in the report (pp. 14-15) (i.e., that the court be a "flexible and supplementary facility" for States parties to its statute and that the court not have compulsory or exclusive jurisdiction), strikes a proper and realistic balance between the many competing interests at stake. The report helped focus the attention of Member States on these issues and others identified during the course of the discussions in the Sixth Committee.

The United States hopes that the Commission will re-establish its Working Group and continue its useful work by providing detailed analysis of the issues relating to the establishment of an international criminal court, including appropriate options. In this respect, the United States encourages the Commission to seek the views of the General Assembly in order to prepare draft articles for the establishment of a tribunal which will be capable of attracting the widest possible support.

The United States notes that the distinguished Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind has proposed in his eleventh report (A/CN.4/449) a draft statute for an international criminal court. We have only just received the report and will be studying it carefully before making any detailed comments. The United States welcomes the Special Rapporteur's proposal as a significant contribution to the process of identifying and analysing the various issues related to the establishment of an international criminal court. However, we believe that more analysis and further guidance from the General Assembly are required before the Commission can provide the General Assembly with a draft statute capable of attracting the support necessary to make an international court a reality.

The United States believes that both the Commission and the General Assembly will want to take into account the developments regarding the establishment of an ad hoc tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (Security Council resolution 808 (1993), para. 1). While there are many important differences both in circumstances and objectives that in some respects will likely compel different approaches, the establishment of such an ad hoc tribunal may provide significant insight into the many issues associated with establishing an international criminal court. A number of comments and proposals were submitted to the Secretary-General in response to the decision of the Security Council to establish the tribunal. The report of the Secretary-General to the Security Council on this subject has just been released (S/25704 and Add.1). There has also been considerable activity outside of the United Nations, for example, the recent international meeting of experts at Vancouver, British Colombia, Canada, hosted by the International Centre for Criminal Law Reform and Criminal Justice Policy, which addressed in detail the issues relating to the establishment of both the ad hoc tribunal and the international criminal court.

The United States believes that consideration of the establishment of an international criminal court should be governed by three major principles: first, the development and implementation of such a tribunal should further, not harm, international law enforcement efforts. This is of particular concern in the case of narco-traffickers and terrorists. Secondly, such a court should be fashioned so as to minimize the potential for politicization of any sort. Finally, and fundamentally, it is imperative to make sure that the tribunal is both fair and effective - that questions concerning such issues as scope of jurisdiction, applicable law, rules of procedure and evidence, and appeal are adequately addressed in a realistic, just and workable fashion.

The need fully to identify and consider the issues involved

As the Commission recognized, the report was not meant to be an exhaustive treatment of the many issues associated with such an undertaking and further examination is needed on a number of important issues. Thus, while the report is a helpful start, it is clear that further consideration is required on how best to resolve many of the difficult questions which it raises, such as the subject-matter jurisdiction of the court; how matters are to be brought to the court; whether States must consent to the court's jurisdiction and, if so, which States must consent; and how the court will secure personal jurisdiction over an offender. Other important issues were identified during discussion of this subject in the Sixth Committee. Additional issues have been identified in connection with proposals to establish the ad hoc war crimes tribunal for Yugoslavia, for example, the important requirement for a separate (and independent) appellate court, to which appeals can be taken on the basis of an error of law invalidating the decision or an error of fact that caused a manifest miscarriage of justice.

Still other issues have been identified in the consideration of these proposals outside the United Nations, for example, issues relating to the rules of procedure and of evidence which were the subject of extensive discussion at the Vancouver meeting of experts. The United States believes that the approach adopted in regard to fundamental issues such as these may have implications for other aspects of any resulting regimes.

The report acknowledges that in "some cases" it has done no more than outline a range of solutions without indicating a preference or an analytic basis for arriving at those solutions. However, as discussions among international experts such as those at the recent Vancouver meeting demonstrate, many issues warrant fuller treatment. For example, with respect to six critical issues (the system of prosecution, the initiation of the case, bringing defendants before the court, international legal assistance, implementation of sentences, and the relationship of the court to the existing extradition systems), the report acknowledges (p. 32) that "in the time available the Working Group has not been able to discuss these issues in much detail: what follows ... is accordingly tentative and exploratory. The issues will need fuller examination if it is decided that the Commission should proceed to draft a statute for a court." The report stated that "the precise details of such a system do not have to be worked out here" when addressing such questions as the jurisdiction of the court over offences and the accession by States to its

jurisdiction (p. 18), the regime of personal jurisdiction (p. 21), and the interplay between national and international law.

Subject-matter jurisdiction of the court

One of the more fundamental preliminary questions, as the report recognizes, is the scope of subject-matter jurisdiction of the court. The report notes at the outset that the idea of an international court originated as a forum for prosecuting State-sponsored war crimes and genocide that otherwise go unpunished (see p. 11). The report expands that limited jurisidiction, however, to all crimes of an "international" character. An analysis of the issues (such as those involving consent and how cases and defendants are brought before the court) may not be the same for the narrow class of State-sponsored war crimes as it would for narco-trafficking. These issues are characterized in the report as "details" to be worked out later.

These are, however, critical questions, and ones which have important implications in the light of the proposed regime of consent rather than compulsory jurisdiction. As noted above, we agree with the basic premise that the court should be conceived as a flexible, supplementary facility, based on consent. This has a bearing, however, on the scope of crimes involved. Who consents where the crime is one of an "international character"? What happens when the views of equally interested States are not in harmony? And how will a State be convinced to surrender its national to the international court if it is not willing to extradite its national to another forum?

We have particular and major concerns with the report's approach to the proposed court's subject-matter jurisdiction and the substantive definition of crimes. The report assumes that the draft Code of Crimes against the Peace and Security of Mankind (pp. 22-23) will serve as a basis of the subject-matter jurisdiction of the court. Although the report provides that States may not need to accept the Code of Crimes in order to subject themselves to the jurisdiction of the international court, it states explicitly that "[t]here are clearly important links between the two projects" (p. 22). This strong linkage between the two also appears elsewhere within the report (p. 19). The United States, like many other States, has expressed its serious reservations about the draft Code of Crimes, which are detailed in our recent submission to the Secretary-General in accordance with paragraph 9 of General Assembly resolution 46/54 of 9 December 1991 (see A/CN.4/448). To the extent that the proposal to establish the court is tied to the Code, those reservations extend to the proposed court as well.

In addition, under the report's proposal, the crimes assigned to the international criminal court potentially include all crimes that may be the subject of multilateral treaties. The report explains that "[i]t is not necessary to reach agreement at this stage on the precise list of international criminal law treaties: they would certainly include serious war crimes, the Genocide Convention, the Apartheid Convention, the various conventions on hostage-taking, hijacking of ships and aircraft, etc." (p. 19). However, most multilateral treaties dealing with criminal offences are clearly premised on, and are designed to facilitate, national prosecution. The proposed

internationalization of crimes presently subject to multilateral treaties does not appear to take into account this underlying premise.

Moreover, we question strongly whether an international criminal court is appropriate where the crime may be international or multinational but there none the less exists an effective national forum for prosecution. In particular, we wonder if it is desirable for nations to be given a means for abdicating their responsibility where "the criminal justice system of a small State is overwhelmed by the magnitude of a particular offence" (p. 11) or the prosecution is otherwise awkward.

The additional limitation proposed by the report - that the Court's jurisdiction be restricted to only the "most serious offences ... which themselves have an international character" (p. 19) - is also not particularly instructive. Many crimes have an "international character". The United States questions whether all categories of crimes that have an international character should potentially come within the jurisdiction of the criminal court. And, if only the most serious of these offences are to be within the court's jurisdiction, how are they to be identified?

Surrender of persons to the court

A particular matter that bears specific mention here is the report's novel proposal that surrender of persons to an international criminal court not be deemed "extradition" (p. 36). As characterized in the report, this would enable the many States that have legislative or constitutional prohibitions against the extradition of their nationals nevertheless to surrender such persons to the international criminal court, on the theory that the international criminal court is, in effect, simply an extension of their own national courts. It is not at all clear that the United States could be party to a court constituted under this theory without running afoul of article III, section 1, of the United States Constitution, which requires that any court exercising the judicial power of the United States must apply United States law, be established by Congress and be composed of judges who are assured of tenure during good behaviour and who are appointed by the President with the advice and consent of the Senate.

In addition, the United States believes it is important that the Commission conduct a survey of States to determine their willingness or ability to accept the ILC's theory that the international criminal court can be deemed for purposes of surrender of their nationals to be simply an extension of their own national courts. The answer to this question may turn out to be among the most important in determining the efficacy of the approach proposed in the report. The results of this survey should be included in the Commission's progress report to the General Assembly.

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COMMENTS OF GOVERNMENTS 1/ ON THE REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION 2/

Addendum

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1/ Submitted further to paragraph 5 of General Assembly resolution 47/33 of 25 November 1992. References to the question of an international criminal jurisdiction are also to be found in document A/CN.4/448 and Add.1 reproducing the comments and observations submitted by Governments on the draft code of crimes against the peace and security of mankind adopted on first reading by the Commission at its forty-third session.

2/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10/A/47/10, annex.

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BELARUS

[Original: Russian]
[19 May 1993]

1. The competent bodies of the Republic of Belarus (Ministry of Justice etc.) look upon the idea of the creation of an international criminal court (ICC) as an extremely promising one.

2. Arising from an analysis of the various categories of crimes and of the various components of such crimes, the competent bodies of the Republic of Belarus support the view that different models of international criminal jurisdiction are needed for different purposes. In their opinion, an ICC may be more or less essential depending on the situation; specifically, it may be either the only possible means or merely an additional means of conducting a criminal trial. They consider that the ICC should be created mainly to administer justice in respect of crimes of an international character.

3. In connection with the fact that a highly developed body of substantive international criminal law is already in existence, the creation of an international criminal court ought not to be closely bound up with the adoption of the code of crimes against the peace and security of mankind, should it be a protracted process. In such a case, the crimes within the competence of the Court might initially be those defined by international treaties in force. After its adoption the code could become one of the international instruments defining crimes within the competence of the ICC. It would be logical to link participation in the code strictly with participation in the statute of the ICC. The opposite correlation might initially not be so strict, although it is to be hoped that the international community will arrive in the long-term at the position of regarding the code as mandatory for all States without exception.

4. In the opinion of the competent bodies of the Republic of Belarus, the international criminal court should initially have mixed competence in relation to international crimes. The crimes within the exclusive competence of the ICC should initially include aggression, the threat of aggression, systematic and mass violations of human rights, genocide and apartheid. Being a party to the statute of the court should automatically entail recognition of the exclusive competence of the ICC in relation to these international crimes. In addition, provision could be made for the sphere of the exclusive competence of the court to be broadened for individual States by means of declarations or agreements with the ICC. Other international crimes could temporarily fall within the sphere of the competing competence of the ICC and national courts. They would not thereby lose their characteristics as international crimes, although after the court had been in existence for a sufficient time the qualification of an act as an international crime could be linked to its inclusion in the sphere of the exclusive competence of the ICC. With respect to crimes of an international nature (general criminal offences with an international element having serious consequences for international relations) only optional jurisdiction might be established. In that case the ICC might be merely an alternative to the existing system of universal jurisdiction.

5. The personal jurisdiction of the international criminal court with respect to the range of persons within its competence would have to be universal, i.e. would have to extend to all persons with respect to whom its jurisdiction could be legally established (the transfer by a State party to the statute of the ICC of such persons, their extradition by a State that is not a party, and their arrest as a result of measures to maintain international peace and security taken in accordance with the United Nations Charter). Accordingly, no agreement with the jurisdiction of the court will be required. This should apply to crimes within the exclusive competence of the ICC. An optional element should exist in relation to crimes that are not within the mandatory jurisdiction of the court, i.e. there should be dependence on the agreement of the State (several States) competent by virtue of existing international law and national law. Failure to comply with the provisions on the mandatory jurisdiction of the ICC should be regarded as a threat to international peace and security and should entail the adoption by the United Nations Security Council of appropriate measures following the submission to it of the report of the international investigative body.

6. Organization of the other links in international criminal justice, in the first instance an international investigative body, is of great importance in connection with the creation of an ICC. It should be emphasized that the need for such a body to exist is long overdue, not only in connection with the creation of a court. In the opinion of the competent bodies of the Republic of Belarus the establishment of an independent prosecuting body would be inappropriate in the initial phase of the existence of the ICC and what could be discussed would be an independent prosecutor designated for each specific case by the court from a previously compiled list of candidates. The role of the prosecutor may not include investigation, the collection of evidence and its submission to the court. That is the role of the investigative body. The prosecutor ought to prepare the indictment and appear as the prosecutor in the trial, relying in the first instance on the information gathered by the investigative body. Only the court has the right to reject unfounded accusations in the course of the hearing.

7. The point of view that the statute of the ICC should take the form of an international treaty is worth support. The United Nations could give active assistance in its elaboration and adoption. Close interaction with the United Nations, which will require the fairly broad participation of States in the statute of the court, could condition the effectiveness of the ICC. Obviously, the basic interaction between the ICC and the United Nations will take the course of contact between the Security Council and the court on matters concerning the transfer to the ICC of cases involving aggression or the threat of aggression, the carrying out of the decisions of the court concerning the appearance of accused persons, and the execution of judgements. The link between the court and the United Nations and, in particular, the Security Council, might initially be an informal one of an ad hoc nature, and matters of an administrative and budgetary order could be settled on the basis of a special agreement between them.

8. In the opinion of the competent bodies of the Republic of Belarus, the circle of those entitled to appeal to the court would have to be fairly broad from its very inception and continuously extended. States not parties to the statute of the court should be allowed to appeal to the ICC in cases in which an accused person is under their jurisdiction, provided that these States recognize the obligatory nature of the statute for the case in question. The United Nations Security Council should also certainly have the right to appeal to the court.

9. The International Criminal Court would have to be a permanent body, which presupposes the existence of a previously established machinery and the permanent composition of its members. What might be discussed would be a system in which each State party to the statute of the court would designate a qualified specialist for a prescribed term to act as a judge. The judges, in their turn, would elect the president of the court and, possibly, the bureau of the court. When the court was required to act the bureau would select the composition of the court (5-7 judges) in the light of the established criteria. It is to be hoped that, as the number of cases increased, the court would in fact be converted into a permanently functioning international body.

10. As regards the law applicable to the ICC, the applicable procedural law (standards concerning the rights of the accused and procedure) should be created along with the court itself, while the applicable substantive law will require the inclusion of an exhaustive list of specific international treaties defining the crimes subject to jurisdiction. The general regulations on applicable law should necessarily include a reference to the principal sources (contractual and customary) and could refer to auxiliary sources. The latter also include national law, the use of which by the court should be sanctioned by an international legal standard.

11. The competent bodies of the Republic of Belarus have a number of specific comments on some of the points in the report of the working group. Ways of solving the question of the competence of the court regarding personal jurisdiction with respect to crimes within the optional competence of the ICC would obviously have to be worked out before the adoption of the code. These options (see para. 458 of the report) should be based on provisions concerning the jurisdiction of existing international treaties. We have doubts regarding the use in paragraph 501 of the report of the term "secondary law" in relation to resolutions of the bodies of international organizations. The basis for their inclusion in applicable law should be that they are additional sources of international law facilitating the application of international agreements and usages. The solution proposed in paragraph 502 of the report concerning the definition of the penalties to be imposed may be regarded as a temporary solution until the adoption of the code of crimes against the peace and security of mankind. In connection with paragraphs 521-527 of the report, it must be emphasized that in relation to crimes within the competence of the ICC the reference should be to the mandatory transfer of accused persons. Consideration may be given to the question of a reservation concerning non-use of the death penalty in the case of the transfer of an accused person by a State in which the use of such a punishment measure has been totally rejected. In connection with paragraph 531 of the report it may be commented that the

statute of the court could include a general provision supplemented by a non-exclusive list of matters with respect to which judicial assistance could be sought, with an indication of the procedure for carrying out commissions. In the long term a full-scale treaty on judicial assistance could be drafted as an annex to the statute of the ICC. How the implementation of sentences is organized will be largely dependent on the number of persons convicted by the verdicts of the court. In the first phase provision will evidently have to be made for the sentence to be served in the complaining State, and the serving of the sentence must be subject to monitoring by the court (by a representative of the bureau).

12. In the opinion of the competent bodies of the Republic of Belarus, the ICC, as outlined in the report, is a minimalistic and fairly flexible concept. Understatement of the characteristics of international criminal jurisprudence envisaged in it may lead to the creation of an ineffective mechanism. What the international community needs, as is shown by practise, is, on the contrary, a really effective mechanism.

SPAIN

[Original: Spanish]
[19 May 1993]

1. The Spanish Government is firmly in favour of the establishment of an international court with general jurisdiction to punish international crimes. The Spanish Government takes the view that such a court can make up for the consequences of international crimes and also believes that its mere existence will be unquestionably important as a deterrent. It therefore endorses the main ideas in the report by the Commission's Working Group, and particularly the keynote of prudence, flexibility and gradualism.

2. The most appropriate legal basis for establishing the court is a treaty open to universal participation, negotiated and concluded in the United Nations, a framework which would make the new court highly representative and impart to it the political and moral authority of the United Nations.

3. Initially, at least, the criminal court should not be a standing full-time body. It would seem preferable, in the beginning, for the court's statute to create simply a straightforward, streamlined and inexpensive mechanism for the administration of justice in each concrete case, as required. However, after the new court's activities have been assessed in the light of reality, a step could be taken towards a standing full-time body.

4. In the first phase, at least, the new court's jurisdiction should not be compulsory. This means that a State's acceptance of the jurisdiction of the court would depend on an ad hoc document, different and separate from that State's expression of consent in being bound by a treaty.

5. As to jurisdiction ratione personae, initially the court should only have jurisdiction to punish international crimes committed by individuals. Punishment for international crimes perpetrated by States involves highly complex legal and political problems and the question of assigning this function to the court should be left for later.

6. As to jurisdiction ratione materiae, the need to observe the principle nullum crimen sine lege means that the only international crimes that can be punished are the ones regarded as such by general international law at the time they are committed. The actual substance of international law in this matter would be determined by those conventions and treaties that unquestionably express the opinio juris of the international community.